Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

ISKCON MIAMI, INC., a Florida nonprofit, religious corporation, and VERNE MEIS, an individual,

Petitioners,

v.

METROPOLITAN DADE COUNTY, FLORIDA, and GARY DELLAPA, Aviation Director of Miami International Airport,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in light of recent significant developments in the airport industry involving the increased commercialization of airport terminals, as well as the transformation of Miami International Airport into a prominent shopping center featuring "retail 'streets' extending . . . throughout the airport" that are "designed to reflect the vibrant character of Miami," the Court's decision in *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992) should be reconsidered as applied to the sale of religious literature and/or the solicitation of donations at such airports.

2. Whether a regulation banning the solicitation of voluntary donations, as well as the sale of religious literature, throughout Miami International Airport – including the exterior sidewalks and parking lots – is substantially overbroad and therefore invalid under *Lee*.

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties to the proceeding. There is no parent or subsidiary company to be listed pursuant to S. Ct. R. 29.6.

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PETITION FOR A WRIT OF CERTIORARI

ISKCON Miami, Inc., a Florida nonprofit, religious corporation, and Verne Meis, one of its members, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals, App. 1, is reported at 147 F.3d 1282. The opinion and order of the district court, App. 25, is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1998. App. 19. An application for an extension of time to file the petition for certiorari was presented to Justice Kennedy, who on October 5, 1998, extended the time to and including November 25, 1998. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED

1. The First Amendment to the United States Constitution provides, in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

2. The Fourteenth Amendment to the United States Constitution, section 1, provides, in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law;. . . . "

3. Metropolitan Dade County, Fla. Code § 25-2.2(a) (1995), provides, in relevant part, as follows:

> No person shall solicit alms or contributions of money or other articles of value, for religious, charitable or any other purpose, and receive money or other articles of value, whether in the form of cash, checks, credit or debit vouchers or any other form of negotiable instrument, in the public areas of the Terminal.

STATEMENT

1. Petitioners, ISKCON of Miami, Inc., a nonprofit, religious organization, and Verne Meis, one of its members, (collectively "ISKCON"), espouse the theological and missionary views of the Krishna consciousness religion, "an outgrowth of the Chaitanya movement of Bengal." *International Soc'y for Krishna Consciousness v. Barber*, 650 F.2d 430, 433 (2d Cir. 1981). In accordance with the central importance of scripture to the religion, Krishna adherents are required to venture into public places for the purposes of proselytizing members of the public, distributing and selling religious literature, and soliciting voluntary donations to support their religion. (Meis Decl. ¶ 4).

The petitioners seek to conduct their activities in the interior, heavily commercialized portions of Miami International Airport (MIA). MIA is a major national and international air transportation center. In 1995, the Airport serviced a total of 33,235,658 passengers. Of this number, 18,792,626 were domestic travellers, while 14,443,032 were international travellers. Approximately 43% (14,291,000) of all passenger traffic at MIA consists of transit or connecting travellers who usually do not leave the terminal building. In 1995, the Airport also serviced 14,398,000 meeters and greeters. (Davis Dep. Ex. 1).

Thirty-seven percent of the travellers passing through MIA have a dwell time of one to two hours; 28% have a dwell time of two to three hours; and 22% spend three hours or more in the Airport. International travellers spend more time in the Airport than do their domestic counterparts. (Miami Int'l Airport, *Retail Concessions Master Plan Executive Summary* at vii-viii [hereinafter *Executive Summary*]).

MIA does not limit or monitor public access to the interior areas of the terminals. Anyone may use the airport facilities for shopping, eating and drinking, banking, and sight-seeing, as well as air travel. (Davis Dep. at 83). MIA even permits and promotes public tours of the airport in order to publicize the numerous art exhibits featured throughout the various terminal areas. (*Id.* at 88).

Petitioners do not seek to conduct their activities in any private offices, ticket counters and lines, check-in areas, baggage claim areas or lines, arrival and departure gates, or exclusively leased waiting areas. Rather, ISKCON members wish to conduct their activities *only* in

areas of general circulation, including corridors, lobbies, and similar spacious areas which are bordered by a wide array of shops, restaurants, lounges, and other commercial establishments and amenities, unrelated or peripheral to air transportation. (Meis Decl. ¶ 10).

Petitioners commenced their *sankirtan* activities at MIA in or about late 1974. Neither the distribution and/or sale of literature, nor the solicitation of donations, has impeded pedestrian traffic flow or caused congestion during the time that petitioners were permitted to conduct their activities. (Davis Dep. at 45-46). Moreover, MIA has authorized the placement of approximately six semi-permanent structures for the commercial sale of consumer products in the same areas where petitioners were formerly allowed to solicit donations and sell religious literature. (Davis Dep. at 80-82).

In June, 1995, the Metropolitan Dade County Commission amended section 25-2.2(a) of the County Code to ban the solicitation of donations in conjunction with the distribution of literature, as well as the actual receipt of funds in the airport. The regulation provides, inter alia, as follows:

> No person shall solicit alms or contributions of money or other articles of value, for religious, charitable or any other purpose, and receive money or other articles of value, whether in the form of cash, checks, credit or debit vouchers or any other form of negotiable instrument, in the public areas of the Terminal.

Metropolitan Dade County, Fla. Code § 25-2.2(a) (1995).

The regulation is not confined to petitioners' activities inside the terminals, but applies to the exterior sidewalks and parking lots as well. Nor is the regulation confined to soliciting, but also precludes the *sale* of petitioners' religious literature. *Id.*

2. Petitioners filed this action on January 5, 1996, seeking declaratory and injunctive relief, as well as an order temporarily restraining enforcement of the regulation.

The district court denied the application for a temporary restraining order on January 10, 1996. By stipulation, the parties agreed to consolidate the hearing on the preliminary injunction with cross-motions for final summary judgment, and on July 10, 1997, the district court filed its Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment. A Final Judgment was filed on the same date.

Finding little room or inclination to maneuver under *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992), the district court relegated its decision to a simple formula: a prohibition on the solicitation of donations and the sale of religious literature in an airport terminal – a nonpublic forum – does not violate petitioners' constitutional rights. App. 31. Although the court noted the existence of "multiple written complaints received from passengers at MIA regarding the conduct and activities of members of ISKCON Miami during the approximately ten year period prior to the enactment of

the ordinance" App. 29,[1] it scarcely acknowledged the crucial fact that in the quarter century that petitioners have operated in MIA, their activities have not caused or exacerbated the free flow of pedestrian traffic in the terminals. (Davis Dep. at 45-46). And, because it found MIA to be a nonpublic forum, the court declined to consider "alternative channels of communication," App. 28, even though section 25-2.2(a) is substantially broader than the regulation at issue in *Lee*.

3. The court of appeals correctly noted that the issue of literature sales was left open by this Court in *Lee*. App. 7-8. Unlike the district court, the court of appeals also recognized that the availability of alternative channels of communication was a relevant consideration, even in a nonpublic forum. App. 13-14. And, the court implicitly acknowledged that the MIA regulation was not promulgated in response to specific concerns over pedestrian traffic congestion caused by petitioners' activities in the airport. App. 11. Nonetheless, the court found section 25-2.2(a) valid in several important respects.

First, despite the commercial sale of consumer products from kiosks and semi-permanent structures set up in the middle of the corridor of level two of the airport (the same areas where petitioners were formerly allowed to solicit donations), the court was unable to discern any significant difference between the problems associated

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[1] The court calculated the number of complaints to be "approximately sixty eight." App. 29. Petitioners, however, counted 79 complaints that were produced by the respondents in the course of discovery. App. 29, n. 9.

with soliciting, and those associated with the sale of literature. App. 10.

Second, the court rejected petitioners' argument that the unprecedented commercialization of airports in general, and MIA in particular,[2] distinguish MIA from *Lee*, and thus renders MIA a traditional public forum akin to modern public thoroughfares. App. 10.

And third, although section 25-2.2(a) imposed a ban on petitioners' fundraising efforts throughout the entire airport, the court found the lack of an alternative location where petitioners would have geographical access to their intended audience a reasonable restriction under the circumstances of the airport. App. 14-17. The court thus held section 25-2.2(a) valid as applied to both the sale of religious literature and the solicitation of donations in a nonpublic forum.

REASONS FOR GRANTING THE PETITION

This petition squarely presents the issue of whether *heavily* commercialized airport terminals, such as those at MIA, are properly classified as "nonpublic" fora. It also raises an issue conspicuously left open in *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992) – whether, in addition to the solicitation of donations, the

[2] The Finance Director of the Airport testified that MIA is a "shopping center with its own airport," (Bustamante Dep. 19), and that petitioners' activities did not impair or interfere with MIA's financial interests. (*Id.* at 26).

sale of religious literature may be banned in an airport terminal.

For almost 25 years, petitioners have distributed and sold religious literature, requested and received voluntary donations, and talked to interested persons about their religious beliefs in the interior, commercialized circulation areas of MIA. During that time, petitioners have neither caused nor impeded pedestrian traffic congestion in the terminals, nor otherwise interfered with essential airport operations.

However, in direct response to *Lee*, where this Court upheld a ban on the solicitation of funds within the New York airport terminals, but struck down a ban on the repetitive distribution of written materials, respondents have imposed a complete ban on all transactions that entail the solicitation of voluntary donations for a religious or charitable cause, or which involve the sale of religious literature, on airport premises. This ban applies not only inside the terminal, but on the exterior sidewalks and parking lots as well.

Respondents may not, as the lower courts allowed them to do, simply rely upon the abstract application of *Lee* in order to prevail. The dramatic commercialization of airports that has occurred over the last seven years dwarfs that which was present in the New York airports in 1972, and is fully manifest in MIA and other important airports in this country and the world. The public forum quality of airport terminals in general, and MIA in particular, thus compel a reconsideration of *Lee*.

Moreover, there exist significant differences between this case and *Lee* that strongly suggest that section

25-2.2(a) is substantially overbroad, even if MIA were to be considered a nonpublic forum. First, section 25-2.2(a) has been held to ban not only voluntary donations, but the sale of religious literature as well. It is highly unlikely, especially with respect to the views expressed by Justice Kennedy in his concurring opinion in *Lee*, that such a result would be countenanced by the Court.

Respondents and the court of appeals have also trivialized another essential component of *Lee* – that there exist a meaningful and realistic alternative channel of communication. That the exterior sidewalks of MIA may be hectic and congested does not relieve MIA of its obligation to provide *some meaningful* access to the audience that petitioners seek to reach, either in the designated areas that were formerly set aside for soliciting and literature sales (but which are now occupied by semi-permanent concessions), or in the areas identified by petitioners' expert, Professor Warburton. (*See* Warburton Decl. ¶¶ 5-6; *see also* Meis Dep. at 63, 68).

Moreover, the opportunity to distribute free literature and speak with interested persons, or hand out preaddressed envelopes that may be sent in with a donation at a later time, blinks "the reality that without solicitation the flow of such information and advocacy would likely cease." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). It would, contrary to constitutional command, limit "[f]reedom of speech, freedom of the press, freedom of religion" to "those who can pay their own way." *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943). Without the ability to raise funds, therefore, either by the sale of literature or voluntary donations, petitioners have no means of procuring the

necessary funds to publish the literature which they distribute. (Meis Dep. at 13, 37).

Because the First Amendment "was not designed to allow expression only when its effects are destined to be futile" *International Soc'y for Krishna Consciousness v. Griffin*, 437 F. Supp. 666, 672 (W.D. Pa. 1977), the petition for certiorari should thus be granted.

I. THE RECEIPT OF FUNDS IN CONJUNCTION WITH THE DISSEMINATION OF EXPRESSIVE MATERIALS IS FULLY PROTECTED SPEECH.

Section 25-2.2(a) is a complete prohibition of core forms of protected speech. It bans, among other things, "solicit[ing] alms or contributions of money or other articles of value, for a religious, charitable or any other purpose," as well as the actual receipt of "money or other articles of value, . . . in the public areas of the Terminal." It also confines literature distribution to inaccessible parts of the terminal building.

When adherents of Krishna consciousness distribute their scriptures, they engage in "an age-old form of missionary evangelism – as old as the history of printing presses," that "has been a potent force in various religious movements down through the years." *Murdock*, 319 U.S. at 108 (footnotes omitted). "[T]he mere fact that religious literature is 'sold' . . . rather than 'donated,' " *Id.* at 111, does not lessen the protection. *International Soc'y for Krishna Consciousness v. Hays*, 438 F. Supp. 1077, 1081 (S.D. Fla. 1977).

This Court has recognized the reality that "virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs." *Buckley v. Valeo*, 424 U.S. 1, 19 (1976). For this reason, it "has never been suggested that the dependence of communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment." *Id.* at 16.

Soliciting for political, charitable and religious causes is also fully protected speech. *E.g., Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 (1981). Solicitation "involve[s] a variety of speech interests – communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes." *Village of Schaumburg*, 444 U.S. at 632. "Face-to-face encounter[s]" such as those employed by the petitioners, in particular, provide a significant "opportunity for the exchange of ideas and the propagation of views." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 798 (1985).

Solicitation also requests an act that is itself expressive – a contribution to the cause. *See Buckley*, 424 U.S. at 21.[3] Indeed, Krishna consciousness adherents are under a

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[3] *See also Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 799 (1985) ("an employee's contribution [to the Combined Federal Campaign] in response to a request for funds functions as a general expression of support for the recipient and its views."); *Ayres v. City of Chicago*, 966 F. Supp. 701, 715 (N.D. Ill.) (message-bearing T-shirts purchased for their

duty to "involve members of the public in service to the movement's deity through contribution." *Edwards v. Maryland State Fair & Agric. Soc'y*, 628 F.2d 282, 285 (4th Cir. 1980). Thus, petitioners believe that it is the act of charity or donating itself that brings the donor or purchaser into the graces of Krishna consciousness, and makes the donors or purchasers more likely to read the literature that they receive. (Meis Decl. ¶¶ 8-10).

II. UNLIKE THE NEW YORK AIRPORTS AT ISSUE IN *LEE*, MIA IS IN EVERY RESPECT A QUINTESSENTIAL PUBLIC FORUM.

Even more so than were the airports in *Lee*, the characteristics of MIA are overwhelmingly similar to the features of a traditional public thoroughfare. Indeed, since the 1992 decision in *Lee*, the function, purpose, and design of airport terminals has changed dramatically. It has been expressly noted with respect to modern airports such as MIA that they are "a crossroad of destinations and cultures." Herbert Muschamp, *Concerned More About People Than Planes*, N.Y. Times, July 6, 1997, § 2, at 30, col. 1-2. As much as any other public venue, "[a]irports are . . . hubs in the international marketing of ideas, the public places that figure most largely in the imagination of those properly outfitted with laptops and cell phones, the leaders of a society driven by the exchange of information." Herbert Muschamp, *In Form and Function, It's a*

"psychological value. A party who purchases it tends to agree with [the seller's] position, is willing to give money for the cause and is willing to promote the idea by wearing the T-shirt."), *aff'd*, 125 F.3d 1010 (7th Cir. 1997).

Tale of Two Terminals, N.Y. Times, July 28, 1997, at A7, col. 5.

Consistent with this trend, MIA not only allows broad public access to the Airport, (Davis Dep. at 83), but it has created a multi-purpose facility for the benefit and enjoyment of travelers and nontravelers alike. Like many other airports, MIA has developed a highly successful commercial enterprise in its facilities. "Airports today are beyond air travel. They are not simply places for getting on and off planes. They are marketplaces where shops and restaurants outnumber the waiting areas for planes." *Id.*[4] "Airports have become America's busiest street corners," and so "it's no wonder more and more upscale retailers are starting to show up there, too." Barbara Shea, *Retailers Invade Airports*, Raleigh News & Observer, Nov. 24, 1996, at H7, *available in* 1996 WL 14234234 (hereinafter *Retailers Invade Airports*).[5]

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[4] Nationwide, the development of retail commercial centers is "one of the most active areas of change in the airport facility." G.F. Doughty, *Review of Passenger Service Issues at Airports in Airports for People* 9 (1988). This "striking trend[ ]," *Winged Victories*, Architectural Rec., June 1989, at 130, is not merely ancillary to the airports' purpose, but is an integral feature of their function and design, Paul H. Wright & Norman J. Ashford, *Transportation Engineering: Planning and Design* 622 (1989).

[5] This phenomena is widespread and ever increasing. For example, "[f]ollowing in the 'airports as dwelling spaces' tradition, [Philadelphia Airport] now boasts a creation called the Philadelphia Marketplace. The 45,000 square-foot retail development contains 33 stores selling products at street prices." Jerome Chandler, *Regional Airports*, Frequent Flier, October 1998, at 46.

As airports such as MIA thus "become cyberized and malled up, the downtown cities they serve become increasingly redundant to the . . . traveler." Richard Rayner, *Nowhere, U.S.A.*, N.Y. Times, Mar. 8, 1998, § 6 (Magazine), at 42, 46. Indeed, "[g]oods and services found easily outside airports are being made available inside to the point that some terminals and concourses are beginning to look like shopping malls. And that's exactly the look and feel that operators are aiming for." Norman Sklarewitz, *The Malling Of America's Airports*, Frequent Flyer, Sept. 1995, at 38, 39.[6]

The impetus for this retail growth is the enormous profit that airports generate from the increased amount of time that travelers, as well as meeters/greeters and airport employees, spend in the terminals. For example, 37% of the travellers at MIA have a dwell time of one to two hours; 28% have a dwell time of two to three hours; and 22% spend three hours or more in the airport. (*Executive Summary* at viii).[7] This is substantially greater than the

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[6] Not surprisingly, airports have become "important marketing tools in attracting new businesses, expanding convention trade and increasing domestic and international air service." Laurie McGinley, *Airports Try to Ease the Pain of Waiting With New Ways for Fliers to Spend Money*, Wall St. J., Aug. 21, 1990, at B1, col. 5.

[7] "Meeters" and "greeters" also spend a considerable amount of time in the airport. "[T]he meeter/greeter/well-wishers who come to the airport to pick up or see off passengers . . . spend a lot of time in the airport, an average of 65 minutes. . . . Those seeing travelers off come to have a meal and chat with departing customers. Those meeting arriving passengers come to the airport early and browse, shop and snack." Ira Weinstein & Juliette Madrigal, *Airport Customers and*

amount of time that the average person spends in a shopping mall, which is little over an hour. *See Retailers Invade Airports*, at H7.

Retail concessions at MIA, accordingly, occupy 120 locations in the terminal building, and about 200,000 square feet of space. (*Executive Summary* at xviii).[8] Recently, MIA added eleven boutiques where customers may find "a wide range of men's and women's accessories, from a $68 Bally belt to a $25,000 diamond Cartier watch." Jane L. Levere, *Business Travel*, N.Y. Times, Dec. 27, 1995, at C5. And, over the next ten years MIA plans to refurbish and double the size of its commercial facilities.[9]

These commercial facilities, moreover, are by no means ancillary to the Airport's travel-related functions. At least 46% to 50% of *all revenues* generated at MIA are

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Their Needs for the 1990s, Airport Services, May/June 1991, at 18, 19.

[8] In terms of retail facilities, MIA ranks ahead of such "state of the art" airports as "The Air Mall" in Pittsburgh International Airport, which has 100 retail outlets, and Denver International Airport, which has 110 shops and boutiques. Will Pollock, *Retail Earns Its Wings In The Nation's Airports*, Shopping Center World, Oct. 1, 1996, at 56, *available in* 1996 WL 9296193.

[9] MIA is in the process of expanding its commercial retail space to 300,000 square feet by the year 2000, and 450,000 square feet by the year 2005. The Airport also intends to create "a dynamic shopping environment for airport consumers" which will have an "open, airy, 'South Florida' or 'tropical' feeling, accentuated with architectural elements that reflect the diversity and vibrancy of the City." "[T]he passenger entering the new MIA retail environment will" thus "experience a feeling of being immersed in a total shopping and dining environment in a 'street' setting." (*Executive Summary* ix).

derived directly from its commercial operations, and the fees which the airlines pay to MIA for the space which they use is increased or decreased based upon the revenues generated by MIA from its commercial retail operations. (Bustamante Dep. at 21-22).[10]

MIA, therefore, is not the limited facility that respondents portray it to be, but is rather an expansive, multipurpose facility that features art exhibits, avant garde architectural creations, upscale restaurants and boutiques, sidewalk cafes, and a variety of other retail amenities. MIA is, as respondents put it, not only a "shopping center with its own airport," (Bustamante Dep. 19),[11] but a reflection of "the diversity and vibrancy of the City" which it serves. (*Executive Summary* at xi).

Indeed, as part of its current renovation project, MIA intends to communicate and reinforce the character of the City "through the design of a retail corridor which will have an 'urban street' 'pedestrian' feeling." (*Id.*). The clusters of retail space "will have an open, airy, 'South Florida' or 'tropical' feeling, accentuated with architectural elements that reflect the diversity and vibrancy of the City." (*Id.*). Any person entering MIA will experience a feeling of being *immersed* in a total shopping and dining

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[10] "[O]f the US$9.4 billion earned by 246 of the world's leading airports, about US$4.6 billion derives from non-aeronautical revenue." Sally Gethin, *Airports Retailing: Airside Shopping Is Becoming Big Business*, Jane's Airport Review, Oct. 1, 1997, at 11, *available in* 1997 WL 9500944.

[11] See also Herbert Muschamp, *In Form and Function, It's a Tale of Two Terminals*, N.Y. Times, July 28, 1997, p. A7, col.2 ("The new [Washington, D.C.] National Airport is a department store half-heartedly disguised as a transportation terminal.").

environment in a 'street setting.' (*Id.*). As further explained by the respondents:

> Arriving or departing, the passenger will browse through seemingly endless gift boutiques, sidewalk cafes, bookstores and coffee shops. The 'street' feeling may be reinforced through the possible use of the following: signage which establishes the 'character' of the 'streetscape,' off-street lighting (lamp posts or suspended lamps), street directional signage (Calle Ocho, Ocean Drive, Coco Walk), double level storefront facades, awnings, 'park like' seating in plaza or 'court' areas, and an abundance of trees and flowers. The entire retail area is thus intended to reflect the pace and energy of the City and create an interactive environment which promotes airport shopping as an adventure and is totally devoted to customer satisfaction.

(*Id.*).

In addition to its commercial facilities, the public is encouraged to visit numerous permanent and temporary art exhibits in the airport as part of the Metro-Dade Art in Public Places project. *See* Elisa Turner, *Airport Corridor Is Alive With Immense Public Art*, Miami Herald, Feb. 8, 1996, at 1F. The arrivals area at Concourse F, for example, features 19 digital collages by Lawrence Gartel depicting scenes of South Beach, the Parrot Jungle, Coral Gables, and other Florida "hot spots." Harriet Baskas, *Miami International Airport: Mooning Over Miami* (visited Nov. 18, 1998) <http:/www.abcnews.com/sections/travel/Stuck/airport___miami.html>.

A mile-long canvas painting created by artist Enrique Sierra and 1,200 children runs alongside a moving walkway on the third floor of the airport. *Id.* And, the Concourse A walkway features not only a sound and light sculpture that emits a multicolored glow and environmental sounds and musical tones as pedestrians walk by, but the entire floor of the concourse is composed of black terrazzo embedded with more than 1,000 cast-bronze plants, shells, and marine organisms. *Id.* Entitled *A Walk on the Beach*, the "artwork" was created by Michael Oka Doner and "is designed to evoke the ecology of Florida's beaches and tidal pools." *Id.*[12]

The image of travelers running frantically along terminal pedestrian routes to catch a plane or arrange for ground transportation has thus long been obsolete, especially as applied to MIA. Instead, with airport dwell times

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[12] It is common amongst airports to employ art as a means of "generat[ing] public support for [airport] facilities." Greg Irsfeld *Airports Use Art To Enhance Terminals, Community Relations*, Airport Services, May, 1989, at 20 [hereinafter *Airports Use Art*]. San Francisco International Airport, for example, spends $1 million annually on its much "heralded" art. "Art hangs on corridor walls and in waiting areas, dangles over escalators and moving sidewalks, and lodges in cases along the walls of the tunnels that link the three terminals." Suzanne Carmichael, *Stuck at the Airport? Then Look at the Art*, N.Y. Times, Dec. 15, 1991, § 5 (Travel), at 8. At Orlando International Airport, artworks are "located throughout the terminal" *Airports Use Art, supra*, at 22, and the airport and its concessionaires jointly sponsor an annual arts festival which airport officials describe as a "good way to bring people into the airport." *Id.* Its purpose "is geared to the airport as a community center" *id.*, and during the show free parking is provided to those attending the festival. *Id.*

ever increasing, travelers and nontravelers alike spend a considerable portion of their time in the airport dining in upscale cafes and restaurants, perusing and purchasing thousands of consumer goods offered in the shops, stores, and boutiques, viewing art and architectural attractions, or simply sitting around reading Krishna consciousness literature while waiting for a flight to depart or arrive.

"[T]he Airport's numerous commercial adjuncts indicate that [MIA] has intentionally devoted the facility to considerable commercial activity supportive of but essentially independent of the primary purpose." *Multimedia Publ'g Co. v. Greenville-Spartanburg Airport*, 991 F.2d 154, 163 (4th Cir. 1993).[13]

It is thus clear in every respect that MIA has become a traditional public forum that is inherently inconsistent with the restrictions imposed by section 25-2.2(a), and which ought to be available for the reasonable exercise of petitioners' sales and solicitation activities.

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[13] This is the precise objective that airports are making every endeavor to achieve. "[T]he goal is to persuade the . . . traveler that he never leave the airport. He can fly in, rent a conference room provided by the airport, one of the airline clubs or an airport hotel, then fly out with the tang of jet fuel never quite forgotten. He might even decide to come to the airport and do business even though he's not travelling." Richard Rayner, *Nowhere, U.S.A.*, N.Y. Times, Mar. 8, 1998, § 6 (Magazine), at 42, 46. Indeed, "with airline delays increasing what is known as passenger 'dwell time' in terminals, it is in the financial self-interest of airports to serve up appealing distractions." Laurie McGinley, *Airports Try to Ease the Pain of Waiting With New Ways for Fliers to Spend Money*, Wall St. J., Aug. 21, 1990, at B1, col. 4.

II. SECTION 25-2.2(a) IS SUBSTANTIALLY BROADER THAN THE REGULATION AT ISSUE IN *LEE*, AND IS THEREFORE INVALID.

Respondents claim to have patterned their ban after this Court's decision in *Lee*. The ban imposed by section 25-2.2(a), however, exceeds that which was approved by *Lee* in two important respects. First, it encompasses all forms of fundraising at MIA – solicitations as well as the sale of literature. And second, the ban applies to the entire airport, including the exterior sidewalks and parking areas, and thus fails to provide petitioners with alternative access to the audience which they seek to reach.

A. Literature Sales v. Donations.

The court of appeals correctly recognized that the issue of literature *sales* was not directly addressed by this Court in *Lee*. App. 7-8. However, the court found no meaningful distinction between the problems purportedly associated with solicitations, and those attendant to actual sales, App. 8, and upheld section 25-2.2(a) as applied to literature sales as well as to the solicitation of donations. Although "no majority directly addressed the ban on the sale of literature" in *Lee*, App. 7, it is doubtful that the court of appeals' holding would pass muster if this Court were to consider the sales issue.

This conclusion is based directly on Justice Kennedy's concurring opinion in *Lee*. Although Justice Kennedy supported the ban on soliciting in the New York airports, he emphasized that in his "view the airport corridors and shopping areas outside of the passenger security zones, areas operated by the Port Authority, are

public forums, and speech in these places is entitled to protection against all government regulation inconsistent with public forum principles." 505 U.S. at 693 (Kennedy, J., concurring in the judgments).[14] Justice Kennedy, accordingly, would have allowed not only the free distribution of literature in the airport, but the *sale* of literature as well.

According to Justice Kennedy, "the right to distribute flyers and literature lies at the heart of the liberties guaranteed by the Speech and Press Clauses of the First Amendment." 505 U.S. at 702-03. Consequently, the Court has

> long recognized that to prohibit the distribution of literature for the mere reason that it is sold would leave organizations seeking to spread their message without funds to operate. 'It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge.' . . . The effect of a rule or law distinguishing between sales and distribution would be to close the marketplace of ideas to less affluent organizations and speakers, leaving such speech as the preserve of those who are able to fund themselves.

Id. at 709 (citations omitted).

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[14] "If our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property and its customary use by the public may control the case." *United States v. Kokinda*, 497 U.S. 720, 737-38 (1990) (Kennedy, J., concurring in the judgment).

Petitioners' right to *sell* religious literature in the terminals is further enhanced by the numerous commercial activities that MIA currently allows *in the same areas* where petitioners were formerly allowed to solicit donations. (Davis Dep. at 80-82). These commercial sales activities, which are conducted from kiosks and semi-permanent structures located in the middle of the corridor, purvey such amenities as coffee, cocktails, cellular phones, sports paraphernalia, sunglasses, and cosmetics. (*see id.* at 80-82). And, like petitioners' fundraising activities, such commercial sales entail the request and receipt of money, and attract far larger crowds and lines than do petitioners' activities.[15] Consequently, although the court of appeals was concerned with the deleterious effects that might be caused by literature sales, such concerns are even more pervasive when associated with the extensive commercial sales currently permitted by the respondents.[16]

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[15] The presence of these commercial facilities undermines the restriction on soliciting even in a nonpublic forum. Indeed, the solicitation ban in *Lee* was premised primarily on the Port Authority's interest in avoiding pedestrian congestion. 505 U.S. at 683-84; *see id.* at 689-90 (O'Connor, J., concurring); *see also Kokinda*, 497 U.S. at 733-34. Here, however, respondents have acknowledged that petitioners' sales and solicitation activities do not impede pedestrian traffic flow in the airport. (Davis Dep. at 45-46). The very linchpin of *Lee*, therefore, is not present in this case, and MIA has failed to establish that the sale and distribution of religious literature in conjunction with the solicitation of voluntary contributions is inherently disruptive of air travel.

[16] *Cf. Van Allsburg v. City of Kansas City*, 600 F. Supp. 1226, 1232-33 (W.D.Mo. 1984) ("If having a vendor sell recreation-related articles purely for personal profit is allowed under the

B. Adequate Alternative Channels Of Communication.

Section 25-2.2(a) prohibits petitioners' fundraising activities not only inside the terminals, but on the exterior sidewalk and parking lot areas as well. This Court has held invalid regulations that prevent the speaker from using a "unique and important" *City of Ladue v. Gilleo*, 512 U.S. 43, 54 (1994) mode of expression for which there is "no practical substitute." *Id.* at 57. An alternative is not "ample or adequate [if], among other things, it is 'more expensive' than the prohibited means of communication' " *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229, n.3 (9th Cir. 1990), or it denies petitioners access to their "intended audience." *Id.* at 1229; *see Heffron*, 452 U.S. at 655 ("The First Amendment protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be opportunity to win their attention.' ").

The court of appeals, accordingly, correctly noted that "the availability of nearby places open for expressive activity [i]s a factor weighing in favor of the reasonableness of speech in a nonpublic forum." App. 13. In upholding the ban on soliciting inside the terminals in *Lee*, for example, this Court observed that soliciting was allowed in "sidewalk areas outside the terminals." 505 U.S. at 684. The Court elaborated:

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present policies as not unduly commercializing the parks, the Court is convinced that the nature, function, order, and beauty of parks can be preserved by restrictions significantly less onerous than a total ban on fundraising.").

> The sidewalk area is frequented by an overwhelming percentage of airport users, see . . . App. 515-516 (noting that no more than 3% of air travelers passing through the terminals are doing so on intraterminal flights, *i.e.*, transferring planes). Thus the resulting access of those who would solicit the general public is quite complete. In turn we think it would be odd to conclude that the Port Authority's terminal regulation is unreasonable despite the Port Authority having otherwise assured access to an area universally traveled.

Id. at 684-85.

In contrast to the rule articulated in *Lee*, section 25-2.2(a) fails to furnish petitioners with an alternative *location* where they can contact the audience that they would otherwise find inside the airport.[17] In *Heffron*, for example, the Court upheld a rule restricting soliciting to a booth within the Minnesota State Fairgrounds. The Court stressed that the restriction did not completely ban soliciting, but rather confined it to a specific area "where visitors are expected, and indeed encouraged, to pass." 452 U.S. at 655 n.16.

Here, the MIA ordinance, rather than *granting* "quite complete" "access of those who would solicit the general public," expressly *forbids* solicitation *anywhere* in the airport complex, *including* the exterior sidewalk and the

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[17] As a general proposition, it has long been established that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 164 (1939).

parking areas. This stark contrast renders the present law unreasonable and thus invalid under *Lee*.

Rather than meet petitioners' assertion – based on the plain text of *Lee* – that the *complete* ban is an invalid restriction in a nonpublic forum taken as a whole, the decision of the court of appeals teases out the sidewalks and parking areas as separate places, concludes they are nonpublic fora in and of themselves, and then argues that, so separately considered, the ban is reasonable. App. at 14-15. The fallacy is that these areas – terminals, sidewalks, parking lots – cannot be considered in isolation, but as parts of a whole, and that, to be reasonable, the law must permit *geographical* access to that whole or some large portion of it. Were this not the case, this Court in *Lee* would not have found it necessary to point out that "it would be odd to conclude that the Port Authority's terminal regulation is unreasonable despite the Port Authority having otherwise assured access *to an area* universally traveled." 505 U.S. at 684-85 (emphasis added).

The court of appeals next observed that the chaotic and hectic conditions on the exterior sidewalks relieve MIA of the obligation to provide a meaningful and effective alternative channel of communication. App. 15-16. This contention, however, merely begs the question. The determining factor in *Lee* was not the theoretical availability of the exterior sidewalks, but rather the *access* which the sidewalks provided to airport users. Here, petitioners have no quarrel with the conditions on MIA's exterior sidewalks. However, this does not relieve MIA of its obligation to provide an *alternative location* where petitioners will also have access to the "overwhelming percentage of airport users." Rather, the unavailability of the

exterior sidewalks underscores petitioners' right of access to the interior terminals where the relevant audience can be found.

In order to soften the severe hardship created by section 25-2.2(a), the court of appeals refers to petitioners' right to give out free literature. App. 16. Without the ability to sell or solicit, however, petitioners have no way of paying for the literature which they distribute or supporting their religious cause. (Meis Dep. at 13, 37); *see Murdock*, 319 U.S. at 111 ("It is plain that a religious organization needs funds to remain a going concern."); *Buckley*, 424 U.S. at 19 ("[V]irtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs.").

Indeed, without the ability to solicit or otherwise raise funds "the flow of . . . information and advocacy would likely cease," *Village of Schaumburg*, 444 U.S. at 632, and it may prove impossible, especially for newly-organized or underfunded groups, to print and distribute religious texts or otherwise "communicate" their "ideas and goals" to the public. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 799 (1985). "It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge. It is plain that a religious organization needs funds to remain a going concern." *Murdock*, 319 U.S. at 111.

The "deferred payment plan" suggested by the court of appeals, App. 16, and by Justice Kennedy in *Lee*, 505 U.S. at 707-08, also fails as an adequate alternative to

sales and solicitation. As explained by petitioner Meis, the "deferred payment plan" was tried at MIA, but was unsuccessful. (Meis Dep. at 65-66). And, as pointed out by Justice Kennedy in *Lee*, "[a]ttempting to collect money at another time or place is far less plausible in the context of a sale than when soliciting donations, because the literature sought to be sold will under normal circumstances be distributed within the forum." 505 U.S. at 708.

Nor can it be said that solicitation at large in the city is an "adequate alternative channel." The vast and varied audience at the airport is unique; indeed, 43% of the people who pass through MIA are connecting passengers who would not leave the airport at all. (Davis Dep. Ex. 1). Thus, "serious questions exist as to whether [section 25-2.2(a)] leave[s] open ample alternative channels for communication." *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976).

CONCLUSION

For all of the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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November 25, 1998

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-5304

D.C. Docket No. 96-28-CIV-WMH

ISKCON MIAMI, INC., a Florida nonprofit religious corporation, VERNE MEIS, an individual,

Plaintiffs-Appellants,

versus

METROPOLITAN DADE COUNTY, FLORIDA, GARY DELLAPA, Aviation Director of Miami International Airport,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(July 27, 1998)

Before EDMONDSON and BARKETT, Circuit Judges, and ALARCÓN*, Senior Circuit Judge.

BARKETT, Circuit Judge:

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* Honorable Arthur L. Alarcón, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

Appellants ISKCON Miami, Inc. and Verne Meis (collectively, "ISKCON")[1] appeal from an adverse summary judgment order rejecting ISKCON's First Amendment challenge to Dade County regulations prohibiting solicitation of funds and the sale of literature at Miami International Airport ("MIA") and restricting the areas where people may distribute free literature at the airport. In addition to arguing that the bans on solicitation and sale of literature are unconstitutional restrictions on speech, ISKCON argues that the areas within MIA where ISKCON may distribute free literature are inadequate and that County regulations impermissibly grant the Director of MIA unfettered discretion to select the areas for such First Amendment activity.

BACKGROUND

In June 1995, Dade County amended its regulations regarding First Amendment activity at MIA. Section 25-2.2(a) of the Code, the principal regulation challenged here, provides:

> No person shall solicit alms or contributions of money or other articles of value, for religious, charitable, or other purpose, and receive money or other articles of value, whether in the form of cash, checks, credit or debit vouchers or any other form of negotiable instruments in the public areas of the Terminal.

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[1] "ISKCON" is an acronym for the International Society for Krishna Consciousness. Verne Meis is a member of ISKCON.

Metropolitan Dade County, Fla., Code, ch. 25, § 25-2.2(a) (1995). ISKCON also challenges § 25-2.2(c) of the Code, which gives the Director of MIA

> the authority to prescribe from time to time restrictions applicable to First Amendment activities at the Airport. Such restrictions . . . may include, but not be limited to, identifying specific locations of First Amendment zones in the Terminal Building and other Airport facilities, limiting the number of persons permitted in such zones, and providing a method for resolving conflicting requests for such zones.

Under § 25-2.2(d), these restrictions "shall be reasonable and appropriate, and made only after a finding by the Director that the restrictions are necessary to avoid injury, to persons or property, or to assure the safe and orderly use of the Airport facilities by the public."

Members of ISKCON espouse the theological and missionary views of the Krishna consciousness religion. In accordance with the importance of scripture to the Krishna religion, Krishna adherents are required to venture into public places to distribute religious literature and solicit support for the religion, a practice known as sankirtan. ISKCON has been practicing sankirtan at MIA since 1974. Shortly after the new regulations were passed, ISKCON filed this action. ISKCON argues that the regulations unconstitutionally prohibit solicitation of funds for the Krishna religion and the sale of religious literature throughout MIA, including the sidewalks and parking lots outside the terminal buildings. ISKCON also argues that the Director has unreasonably restricted ISKCON's

ability to engage in the free distribution of literature and other First Amendment activities at MIA by limiting the places where ISKCON may conduct such activities to eight areas interspersed along the second level of MIA – where the ticketing, security, arrival and departure gates, and waiting areas are located. The district court decided this case on cross-motions for summary judgment, upholding the regulations against ISKCON's First Amendment challenge. We affirm.

DISCUSSION

In determining whether the regulations at MIA withstand constitutional scrutiny, we are guided by the Supreme Court's decisions in *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992), and *Lee v. International Society for Krishna Consciousness, Inc.*, 505 U.S. 830 (1992) (per curiam) (collectively, "*Lee*").[2] In *Lee*, the Supreme Court considered a challenge brought by ISKCON to restrictions on the sale and distribution of literature and solicitation of contributions in New York's airports.

In an opinion authored by Chief Justice Rehnquist, a majority of the Court found the solicitation ban constitutional. Because the plaintiffs in *Lee* sought access to government property to engage in protected speech, the Court analyzed the constitutionality of the regulation

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[2] The several opinions which comprise the Court's decisions in the two *Lee* cases are reported separately in the official Supreme Court reporters. For the sake of convenience, we refer to all of these opinions collectively as "*Lee*."

under the public forum doctrine. Under this doctrine, regulations on speech in traditionally public fora such as municipal sidewalks and parks are subject to strict scrutiny, as are regulations in fora designated by the government to be used for expressive activities. *Id.* at 678; *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 800 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). All other government property is nonpublic, and the government may restrict speech in nonpublic fora as long as the restrictions are reasonable and viewpoint-neutral. *Lee*, 505 U.S. at 679. The Court in *Lee* concluded that the airport terminals at issue were nonpublic fora, reasoning that airport terminals could not qualify as public fora, because, "given the lateness with which the modern air terminal has made its appearance, it hardly qualifies for the description of having 'immemorially . . . time out of mind' been held in the public trust and used for purposes of expressive activity." *Lee*, 505 U.S. at 680 (quoting *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515 (1939)). "[I]t cannot fairly be said that an airport terminal has as a principal purpose promoting 'the free exchange of ideas.' To the contrary, . . . Port Authority management considers the purpose of the terminals to be the facilitation of passenger air travel, not the promotion of expression." *Id.* at 682 (quoting *Cornelius*, 473 U.S. at 800).

Although restrictions on speech in nonpublic fora are not subject to strict scrutiny, "[t]he Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints." *United States v. Kokinda*, 497 U.S. 720, 725 (1990) (plurality opinion). Restrictions must still be reasonable and "not an

effort to suppress the speaker's activity due to disagreement with the speaker's view." *Lee*, 505 U.S. at 679. At the same time, "[t]he restriction 'need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation.' " *Id.* at 683 (quoting *Kokinda*, 497 U.S. at 730 (plurality opinion)).

Having determined that the airports are nonpublic fora, the majority then upheld the ban on solicitation. Noting the "disruptive effect that solicitation may have on business," *id.*, the Court found the ban to be reasonable. "Passengers who wish to avoid the solicitor may have to alter their paths, slowing both themselves and those around them. The result is that the normal flow of traffic is impeded." *Id.* at 683-84. The Court also found that:

> face-to-face solicitation presents risks of duress that are an appropriate target of regulation. The skillful, and unprincipled, solicitor can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid the solicitation. . . . The unsavory solicitor can also commit fraud through concealment of his affiliation or through deliberate efforts to shortchange those who agree to purchase. . . . [T]he targets of such activities frequently are on tight schedules . . . mak[ing] such visitors unlikely to stop and formally complain to airport authorities.

Id. at 684. Because of the risks and disruptions created by solicitation, the Court in *Lee* concluded that although solicitation is a form of speech protected by the First Amendment, the Port Authority's prohibition on solicitation inside the airport terminals was reasonable.

In contrast, a separate majority of the Court in *Lee* found the ban on distribution of literature at the airports unconstitutional. Five Justices concurred in the Court's judgment with respect to the distribution ban, albeit for different reasons. Justices Kennedy, Souter, Blackmun, and Stevens treated the airport terminals as public fora, and found the distribution ban invalid under the strict scrutiny test. Writing separately, Justice O'Connor agreed with the majority in the first *Lee* decision that airports are not public fora, but she concluded that the ban on distribution was an unreasonable restriction on speech.

While the regulations in question in *Lee* were phrased to prohibit both the sale and the distribution of literature,[3] no majority of the court directly addressed the ban on the sale of literature. The per curiam opinion in *Lee* stated only that it was affirming "the judgment of the Court of Appeals holding that the ban on distribution of literature in the Port Authority airport terminals is

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[3] The regulations stated:

> 1. The following conduct is prohibited within the interior areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner:
>
> (a) The sale or distribution of any merchandise, including but not limited to jewelry, food stuffs, candles, flowers, badges and clothing.
>
> (b) The sale or distribution of flyers, brochures, pamphlets, books or any other printed or written material.
>
> (c) The solicitation and receipt of funds.

Lee, 505 U.S. at 675-76 (citation omitted).

invalid under the First Amendment." *Lee*, 505 U.S. at 831.[4] Although in his separate concurrence Justice Kennedy specifically distinguished the ban on solicitation (which he found permissible) from the ban on the sale of literature (which he declared impermissible), *id.* at 708-09 (Kennedy, J., concurring), no other Justice joined this portion of Justice Kennedy's opinion. Justice O'Connor, the only Justice who found the distribution ban unconstitutional under the majority's nonpublic forum analysis, discussed only distribution, emphasizing that the problems of disruption associated with solicitation were not present in the case of distribution. *See id.* at 689-90 (O'Connor, J., concurring). Thus, the precise holding of *Lee* as to the ban on the sale of literature is unclear.

Notwithstanding the ambiguous nature of this aspect of the Court's holding, we conclude, based on the various opinions and statements in *Lee* and in other Supreme Court decisions, that the same problems that justify a governmental restriction on solicitation in a nonpublic forum may render a similar prohibition on the sale of literature reasonable. In upholding restrictions on solicitation, the Court has focused on the inconvenience, disruption, and intrusion associated with the act of engaging in the immediate exchange of money with passersby, in contrast to merely handing them literature:

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[4] Similarly, in its opinion in *Lee*, the Court of Appeals for the Second Circuit mentioned only the ban on distribution, not sales. *International Soc'y for Krishna Consciousness v. Lee*, 925 F.2d 576, 582 (2d Cir. 1991) ("We therefore hold that the Port Authority must provide reasonable access to the terminals for the distribution of literature.").

> Solicitation requires action by those who would respond: The individual solicited must decide whether or not to contribute (which itself might involve reading the solicitor's literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card. . . . As residents of metropolitan areas know from daily experience, confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information. One need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand, but one must listen, comprehend, decide, and act in order to respond to a solicitation.

Kokinda, 497 U.S. at 734 (plurality opinion); *Lee*, 505 at 683 (quoting *Kokinda*). The sale of literature similarly requires that the person asked to buy stop, listen to the sales pitch, contemplate the item offered for sale, and then act to make the purchase. *See Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 665 (1981) (Blackmun, J., concurring in part and dissenting in part) ("[C]ommon-sense differences between literature distribution, on the one hand, and *solicitation and sales*, on the other, suggest that the latter activities present greater crowd control problems than the former.") (emphasis added). This description of the problems associated with the sale of literature in a busily traversed airport "rings of 'common sense,' which is sufficient . . . to uphold a regulation under reasonableness review." *Kokinda*, 497 U.S. at 734 (plurality opinion) (internal citation omitted) (quoting *Heffron*, 452 U.S. at 665 (Blackmun, J., concurring in part and dissenting in part)).

In accordance with the reasoning set forth in *Lee*, we conclude that the regulations prohibiting solicitation and sale of literature at MIA are reasonable restrictions on speech that withstand appellants' constitutional challenge.[5] First, *Lee* establishes that MIA is a nonpublic forum. Although MIA might serve a number of commercial and other purposes, *see id.* at 688-89 (O'Connor, J., concurring), the main or primary purpose of the airport is to facilitate air travel, *id.* at 682 (majority opinion). Contrary to ISKCON's assertion that MIA differs from the New York airports in ways that render MIA a public forum, *Lee*'s determination that airports are not public fora was not limited to the particular airports at issue, but constituted a categorical determination about airport terminals generally. *See Jacobsen v. City of Rapid City, S.D.*, 128 F.3d 660, 662 (8th Cir. 1997); *Air Line Pilots Ass'n, Int'l v. Department of Aviation*, 45 F.3d 1144, 1156 (7th Cir.

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[5] At the outset, we reject ISKCON's argument that the ban on solicitation and sale of literature at MIA is an impermissible content-based regulation. According to ISKCON, the regulation is content-based because it singles out a particular type of speech – specifically, speech that includes a request for funds. We note that in a nonpublic forum, in contrast to a traditional or designated public forum, the government may draw distinctions based upon content in order to preserve government property for its intended uses. *See Cornelius*, 473 U.S. at 806; *Perry*, 460 U.S. at 49. Of course, viewpoint discrimination is still impermissible. *See Lee*, 505 U.S. at 679. In any event, the Court has held that this type of prohibition, aimed at the abusive practices associated with solicitation, does not discriminate based upon either content or viewpoint. *See Lee*, 505 U.S. at 706 (Kennedy, J., concurring); *Kokinda*, 497 U.S. at 736 (plurality opinion).

1995); *Multimedia Publ'g Co. of S.C. v. Greensville-Spartansburg Airport Dist.*, 991 F.2d 154, 158-59 (4th Cir. 1993). ISKCON has failed to point to any unique feature of MIA that distinguishes it from other airports in general.

Second, the ban on solicitation and sale of literature for the immediate receipt of funds at MIA is a reasonable response to the County's concerns regarding the risks associated with these activities.[6] In this case, Dade County asserts that the ban on solicitation and sale of literature throughout MIA was implemented to address repeated instances of abusive conduct and misrepresentations on the part of ISKCON members engaged in solicitation and the sale of literature at MIA.[7] The Court in *Lee* recognized the potential for fraud and coercion as valid reasons for banning solicitation in airports. *Lee*, 505 U.S. at 684 ("[F]ace-to-face solicitation presents risks of duress that are an appropriate target of regulation."); *id.* at 689-90 (O'Connor, J., concurring). Moreover, as the Court

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[6] ISKCON contends that, on its face, § 25-2.2 is not limited to solicitation for the immediate receipt of funds. However, Dade County interprets the regulation to apply only to solicitation for the immediate receipt of funds, and we use the County's interpretation for purposes of our constitutional analysis. *See Ward v. Rock Against Racism*, 491 U.S. 781, 795-96 (1989).

[7] ISKCON argues that its past misconduct at MIA does not justify the ban, and suggests that the ban here operates as a prior restraint. This argument is inapposite, and, in any event, lacks merit. The County amended its regulations to address the risks of fraud and harassment that generally accompany solicitation and sales; the past history of coercion in solicitation and sales at MIA merely strengthens Dade County's argument that the ban is a reasonable one.

in *Lee* explained, solicitation is in many ways inherently incompatible with the primary purpose of an airport – the facilitation of air travel. Solicitation causes delays and disruptions to travelers, who are often heavily laden with baggage and running on tight schedules, and, therefore, is significantly more intrusive than the mere handing out of literature. *See id.* at 683-84; *id.* at 689 (O'Connor, concurring). As discussed above, these same concerns apply with equal force to the sale of literature in airport thoroughfares. For the reasons set forth in *Lee*, we conclude that the prohibition on solicitation and sale of literature at MIA is a reasonable restriction on speech.

ISKCON offers a number of arguments that, it contends, distinguish the ban at issue here from the ban upheld in *Lee* and support its assertion that the prohibitions at MIA are unconstitutional. For example, ISKCON argues that congestion was the dispositive factor in *Lee*, whereas in this case Dade County's decision to implement the ban on solicitation and sales was motivated by concerns about fraud and misrepresentation. We reject ISKCON's argument that *Lee* turned solely on the issue of congestion. *Lee* upheld the solicitation ban for a number of reasons, including problems posed by solicitation in a congested airport terminal. But *Lee* did not rest on this ground alone; it also emphasized the coercive aspects of face-to-face solicitation that make regulation appropriate. As Chief Justice Rehnquist noted for the Court, "[t]he unsavory solicitor can also commit fraud through concealment of his affiliation or through deliberate efforts to shortchange those who agree to purchase. . . . [T]he targets of such activity frequently are on tight schedules . . . mak[ing] such visitors unlikely to stop and

formally complain to airport authorities." *Id.* at 684. Thus, even if congestion was not a motivating factor behind the County's decision to amend its regulations, we conclude that the County acted reasonably in implementing the bans on solicitation and sales based upon the other problems associated with these activities, as described by the Court in *Lee*.

ISKCON further argues that any problems associated with solicitation or sale of literature can be addressed by regulating these activities, rather than banning them outright. We reject ISKCON's contention that the ban on solicitation is unreasonable because of the possibility of less restrictive alternatives. As the Court has repeatedly noted, a restriction on speech in a nonpublic forum will be upheld as long as it is reasonable; "it need not be the most reasonable or the only reasonable limitation." *Kokinda*, 497 U.S. at 730 (plurality opinion).

ISKCON also argues that the MIA regulations are invalid even under the holding in *Lee* because the ban on solicitation and sale of literature extends to the sidewalks and parking lots surrounding the MIA terminal buildings. ISKCON correctly points out that the ban at issue here is broader than the one in *Lee* since the ban is not limited to the terminal buildings. In *Lee*, the Court noted that, because solicitation was still allowed on the much-traversed sidewalks surrounding the airport terminals, "the resulting access of those who would solicit the general public is quite complete." *Id.* at 684-85. It is true that both the Supreme Court in *Lee* and this court have considered the availability of nearby places open for expressive activity as a factor weighing in favor of the reasonableness of restrictions on speech in a nonpublic forum. *See*

id. at 685; *Daniel v. City of Tampa, Fla.*, 38 F.3d 546, 550 (11th Cir. 1994) (footnote omitted) (noting, in upholding ban on distribution of literature at public housing complex, that plaintiff "has unlimited access to the City-owned streets and sidewalks adjacent to the housing complex, allowing him an alternative means for distributing information to residents"); *United States v. Gilbert*, 920 F.2d 878, 886 (11th Cir. 1991) (noting that a factor bearing on the reasonableness of a restriction "is the availability of alternative channels of communication"); *United States v. Belsky*, 799 F.2d 1485, 1489 n.9 (11th Cir. 1986) (upholding ban on solicitation on postal sidewalks, noting that "the municipal sidewalks and streets adjoining the postal buildings remain open as public forums for expressive activity").

The presence of nearby physical space available for expressive activity, however, is merely one factor among many in assessing the reasonableness of speech restrictions in nonpublic fora, and we conclude that in this case, the regulations prohibiting solicitation and sales anywhere on airport property constitute a reasonable restriction in the context of the particular nature and purpose of MIA. In *Kokinda*, the Supreme Court upheld a Postal Service regulation that banned solicitation anywhere on postal property, including the post office buildings and the nonpublic sidewalks surrounding the post offices. *Kokinda*, 497 U.S. at 735 (plurality opinion). Like the sidewalks adjoining the post office at issue in *Kokinda*, the sidewalks and parking lots adjacent to the Miami airport terminals are nonpublic fora; the sidewalks and parking lots are intended by the County to be used for air travel-related purposes, "not to facilitate the daily commerce

and life of the neighborhood or city." *Kokinda*, 497 U.S. at 728 (plurality opinion). The County maintains that the incompatibility between solicitation and sales and the purposes of the airport reaches its zenith on the sidewalks outside the terminal:

> The sidewalks are narrow and extremely congested areas where passengers check their baggage at fixed booths, skycaps wheel carts full of luggage, conveyor belts are used to move baggage and packages, and taxis, vans, and private vehicles drop off and pick up passengers. Due to the layout of the Airport, even a brief delay of persons in these areas can lead to extreme congestion and danger of an accident.

Affidavit of Winona (Dickie) K. Davis, R-1-19-Exh. 1 ¶ 14. It is certainly reasonable for the County to conclude that solicitation and sales of literature would be inconsistent with the particularly hectic nature of the airport sidewalks at MIA.

ISKCON recognizes the problems associated with permitting solicitation and sales of literature on the sidewalks surrounding the terminal buildings, but argues that the County's regulations must permit solicitation somewhere at MIA to pass constitutional muster. As noted above, this contention is contradicted by the Court's opinion in *Kokinda*, which upheld a total ban on solicitation in the nonpublic fora of post office buildings and sidewalks. Likewise, other courts have upheld regulations that completely ban a particular type of expressive conduct from a nonpublic forum as a reasonable exercise of governmental authority to preserve the forum for its intended uses. *See General Media Communications, Inc. v.*

Cohen, 131 F.3d 273, 284-85 (2d Cir. 1997) (upholding constitutionality of congressional act prohibiting the sale of sexually explicit materials at military exchanges), *cert. denied*, 118 S. Ct. 2367 (1998); *Gilbert*, 920 F.2d at 886 (finding injunction prohibiting personal protest inside courthouse and in adjoining portico constitutional). Moreover, the ban in this case does not totally prohibit solicitation or sales of literature. Instead, the regulation only bans solicitation and sales followed by the immediate receipt of funds. Thus, ISKCON is still free both to solicit funds in the airport by pamphleteering and asking travelers to mail in their contributions, and to offer their literature for sale through mail order or in other locations. While these alternatives may be less effective than ISKCON would prefer, ISKCON's ability to seek contributions, for example, by distributing "preaddressed envelopes along with a plea to contribute money," *Lee*, 505 U.S. at 704 (Kennedy, J., concurring), strengthens our conviction that the ban on solicitation and sales of literature is constitutional. *Accord Cornelius*, 473 U.S. at 809 ("The First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker's message.").

Unlike the regulations in *Lee*, the regulations challenged here do permit the distribution of free literature in MIA; however, persons wishing to distribute literature are limited to eight areas in the airport designated by the Airport Director as "First Amendment zones." The eight First Amendment zones are placed throughout the airport terminal, away from ticket lines, metal detectors, and exits and entrances, but adjacent to the flow of passenger

traffic. ISKCON argues that these zones are insufficient and inadequate. As a general matter, as Dade County notes, airports may limit First Amendment activities to particular zones in the terminal buildings. *See Lee*, 505 U.S. at 692-93 (O'Connor, J., concurring); *see also Heffron*, 452 U.S. at 654 (upholding regulation restricting sale or distribution of literature on fair grounds to certain fixed locations). Such regulations are valid place restrictions on speech. *See Lee*, 505 U.S. at 692-93 (O'Connor, J., concurring). In support of its argument that MIA's First Amendment zones are insufficient, ISKCON introduced expert testimony that the current zones are not the best zones for the promotion of expressive activities. As Dade County points out, however, absent more concrete evidence showing that the areas for speech activities at MIA are insufficient, questions concerning the allocation of space for speech activities in the airport are for the Director of MIA. *See Ward*, 491 U.S. at 799 (" 'The validity of [time, place, or manner] regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests' or the degree to which those interests should be promoted.") (alteration in original) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984) (noting that the First Amendment does not give the judiciary "the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise").

Finally, ISKCON argues that § 25-2.2(d) impermissibly grants the Director of MIA unfettered discretion to

select the areas within MIA where First Amendment activities are allowed. As noted above, airport authorities may legitimately set time, place, and manner restrictions on the exercise of First Amendment activities. However, the discretion to set such restrictions cannot be so broad that it "becom[es] a means of suppressing a particular point of view." *Heffron,* 452 U.S. at 649. Because the challenged provisions concern the ability of the Director to restrict the areas in which distribution activities may take place, not the ability of the Director to exclude certain persons from those areas, we reject ISKCON's argument that the authority granted to the Director by the regulations is facially unconstitutional. *See Ward,* 491 U.S. at 795 n.5 (rejecting argument that city sound-amplification guideline operated as a prior restraint on speech, because guideline "grants no authority to forbid speech, but merely permits the city to regulate volume to the extent necessary to avoid excessive noise").

Accordingly, the judgment of the district court is AFFIRMED.

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

No. 97-5304

District Court No. 96-28-Civ

ISKCON MIAMI, INC., a Florida Nonprofit religious corporation, VERNE MEIS, an individual,

Plaintiffs-Appellants,

versus

METROPOLITAN DADE COUNTY, FLORIDA, GARY DELLAPA, Aviation Director of Miami International Airport,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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Before EDMONDSON and BARKETT, Circuit Judges, and ALARCON,* Senior Circuit Judge.

JUDGMENT

(Filed July 27, 1998)

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

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* Honorable Arthur L. Alarcon, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: July 27, 1998
For the Court: Thomas K. Kahn, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: AUG 27 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

ISKCON MIAMI, INC., a Florida nonprofit religious corporation, and VERNE MEIS, an individual,

Plaintiffs,

vs.

METROPOLITAN DADE COUNTY, FLORIDA, and GARY DELLAPA, Aviation Director of Miami International Airport,

Defendants.
_____/

CASE NO. 96-0028-HOEVELER

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(Filed July 10, 1997)

THIS CAUSE comes before the Court upon Defendants' Motion for Summary Judgment (Docket #17), filed August 14, 1996, and Plaintiffs' Motion for Summary Judgment or, in the Alternative, for Preliminary Injunction (Docket #22), filed August 16, 1996. All parties have agreed that the material facts in this case are not in dispute. This Court held a hearing on the Motions for Summary Judgment on September 11, 1996.

BACKGROUND

Plaintiff, the International Society for Krishna Consciousness of Miami, Inc. ("ISKCON"), is a Florida non-profit, religious corporation. Plaintiff Verne Meis is a national *sankirtan*[1] coordinator and is the former *sankirtan* coordinator for Miami (from 1984-1990). From the 1970s until November 1995, Plaintiffs had been practicing *sankirtan* at Miami International Airport ("MIA"). Initially, Plaintiffs could conduct their activities throughout most of the second floor of the terminal. *See Declaration of Verne Meis*, ¶¶ 5, 7. In 1990, *sankirtan* was limited to eight zones on this floor. *Id.* at ¶ 6.

Defendants operate MIA, which serves both domestic and worldwide travelers (over 33 million in 1995). *Plaintiffs' Statement of Material Facts*, ¶¶ 8, 9. The Airport consists of three levels. Level One is devoted primarily to baggage retrieval and ground transportation. Level Two houses airline ticketing, security, arrival and departure gates, and passenger waiting areas. Level Two also contains numerous retail shops and concessions occupying 120 locations.[2] *Id.* ¶ 16. Level Three consists of moving

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[1] *Sankirtan*, an evangelical activity, is a basic tenet of Krishna Consciousness. There are four basic purposes of sankirtan: (1) to spread religious truth, (2) to proselytize and attract new members, (3) to distribute Krishna consciousness literature, and (4) to generate funds to pay for the costs of the literature that is distributed and to support general religious activities. *See Declaration of Verne Meis in Support of Application for Temporary Restraining Order and Preliminary Injunction*, 1996, p.2.

[2] MIA is in the process of expanding its commercial retail space from 200,000 square feet to 450,000 square feet by the year 2005. *Plaintiffs' Statement of Material Facts*, ¶ 17.

and nonmoving walkways connecting the terminal building to a parking facility across the street. *Id.* ¶ 12.

In November 1995, Defendants began enforcing a new regulation (§ 25-2.2 of the Code of Dade County, Florida)[3] which, when applied to Plaintiffs, effectively prohibits ISKCON from requesting and receiving donations anywhere at MIA. In addition, pursuant to subsections (c) and (d) of the regulation, the Airport Director has limited the free distribution of literature to eight specific areas on Level Two of the terminal. *Defendants'*

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[3] The regulation at issue provides, in pertinent part:

> (a) No person shall solicit alms or contributions of money or other articles of value, for religious, charitable or any other purpose, and receive money or other articles of value, whether in the form of cash, checks, credit or debit vouchers or any other form of negotiable instrument, in the public areas of the Terminal [at MIA].
>
> . . .
>
> (c) The Director shall have the authority to prescribe from time to time restrictions applicable to First Amendment activities at the Airport. Such restrictions shall be subject to the requirements of subsection (d) and may include . . . identifying specific locations of First Amendment zones in the Terminal Building and other Airport facilities, limiting the number of persons permitted in such zones, and providing a method for resolving conflicting requests for use of First Amendment zones.
>
> (d) All restrictions prescribed by the Director shall be reasonable and appropriate, and made only after a finding by the Director that the restrictions are necessary to avoid injury, . . . or to assure the safe and orderly use of the Airport facilities by the public.

Response to Plaintiffs' Statement of Material Facts, ¶ 36. In support of the implementation of § 25-2.2, Defendants cite various complaints and incident reports received between April 1985 and December 1994, which relate to solicitation activities at MIA. *Defendants' Statement of Material Facts,* ¶¶ 26, 27.

Plaintiffs filed this action alleging that ordinance § 25-2.2 is unconstitutional on its face and as applied to the solicitation of voluntary donations and the sale and distribution of religious literature. Additionally, Plaintiffs argue that the regulation is overbroad, an unreasonable burden on speech, and impermissibly content-based. Plaintiffs proceed under both 42 U.S.C. § 1983 and 42 U.S.C. § 2000bb-1(c) (Religious Freedom Restoration Act [hereinafter, RFRA]).[4]

On January 10, 1996, this Court denied Plaintiffs' application for a temporary restraining order, noting that Plaintiffs' argument that the Supreme Court decision in *International Society for Krishna Consciousness v. Lee,* 505 U.S. 672 (1992) (upholding a ban on solicitation at airports) does not apply actually "highlights the inability of Plaintiffs to demonstrate the likelihood of success on the

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[4] The Religious Freedom Restoration Act provides, in pertinent part: "A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000bb-1 (c). Although the Supreme Court recently invalidated the RFRA, *see City of Bourne v. Flores,* No. 95-2074 (June 25, 1997), this order nevertheless briefly addresses Plaintiffs' allegations pursuant to that statute.

merits . . . " *See Order Denying Application for Temporary Restraining Order,* January 10, 1996, p.2.

ANALYSIS

I. Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure sets forth the standard that a moving party must satisfy to prevail in a motion for summary judgment:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In reviewing a summary judgment motion a court is not "to weigh the evidence and determine the truth of the matter but [rather] to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 407 U.S. 242, 249 (1986). A court must view the evidence in a light most favorable to the non-moving party. *Rollins v. TechSouth, Inc.,* 833 F.2d 1525, 1528 (11th Cir. 1987). The non-moving party may not rest upon mere allegations or denials in his pleadings, but must set forth specific facts, through affidavits or other forms of evidence provided for by the rules. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157 (1970). If the non-moving party fails to present evidence which, when viewed in a light most favorable to the non-movant, would support a finding for that party, then summary judgment may properly be granted. *Anderson,* 477 U.S. at 253.

The parties have agreed that no material facts are in dispute[5] and that summary judgment is appropriate in this case. As Plaintiffs and Defendants each have moved for summary judgment, the Court turns to analysis of the agreed facts.

II. The First Amendment

a. Regulation of Solicitation

Plaintiffs argue that by prohibiting the solicitation and immediate receipt of voluntary donations in conjunction with the sale and distribution of religious literature, § 25-2.2(a) impermissibly restricts speech and religion without providing an adequate alternative channel of communication. Plaintiffs further allege that the restrictions posed by § 25-2.2 are impermissibly content-based, discriminating between categories of speech that convey information, and speech which conveys information in conjunction with a request for funds.

The solicitation of charitable contributions is protected speech under the First Amendment. *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 789 (1988). Expressive materials do not lose their First Amendment protection merely because they are offered for sale. *ISKCON of Potomac, Inc. v. Kennedy*, 61

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[5] As noted in Defendants' reply memorandum, Plaintiffs' failure to dispute specific facts set forth in *Defendants' Statement of Material Facts* renders such facts "admitted". *Jones v. Gerwen*, 874 F.2d 1534, 1537 n.3 (11th Cir. 1989). In addition, *Plaintiffs' Response to Defendants' Statement of Material Facts*, filed September 9, 1996, admits the overwhelming majority of the facts as stated by Defendants.

F.3d 949, 953 (D.C. Cir. 1995). Thus, the question is whether § 25-2.2(a) is an unconstitutional infringement on such speech.

Defendants maintain that the regulation at issue falls squarely under the Supreme Court's decision in *Lee*, 505 U.S. 672. In that case, the Supreme Court approved similar regulations restricting the solicitation of funds in New York and New Jersey Port Authority airport terminals. *Id.* The Court held that because airport terminals do not qualify as public fora, an airport's restrictions on free speech need only satisfy a "requirement of reasonableness", *id.* at 683, provided the regulation is not an attempt to suppress the speaker's activity due to disagreement with the speaker's view.[6] *Id.* at 679.

Plaintiffs fail to distinguish the instant case from *Lee*. Plaintiffs argue that, unlike the Port Authority airports, MIA has the character of a public forum. *See Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment, or, in the Alternative, for Preliminary Injunction* (hereinafter, *Plaintiffs' Motion for Summary Judgment*) p.7. Plaintiffs draw considerable attention to the number of retail concessions at MIA and argue that the characteristic nature and functions of MIA are not limited to facilitating air travel. *Id.* In *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, the Supreme Court noted that a traditional public forum has as "a *principle purpose* . . . the

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[6] Alternatively, in public fora, regulations of the time, place and manner of expression must be content neutral, narrowly tailored to serve a significant government interest, and must leave open ample alternative channels of communication. *Perry Education Assn. v. Perry Educators' Assn.*, 460 U.S. 37, 45 (1983).

free exchange of ideas." 473 U.S. 788, 800 (1985) (emphasis added). Such is not the case at MIA. Plaintiffs in fact admit as much in their response to *Defendants' Statement of Material Facts*, which reads: "[w]hile the terminal is accessible to the general public, virtually all persons who visit do so for purposes related to air travel." *Plaintiffs' Response to Defendants' Statement of Material Facts in Support of Motion for Summary Judgment*, ¶ 5; *see also, Int'l Caucus of Labor Committees v. Metropolitan Dade County*, 724 F.Supp. 917, 924 (S.D. Fla. 1989) ("Neither the written policy nor the actual practice of the county or the MIA officials manifests an intent to designate the MIA as a public forum. . . . Thus, the MIA must fall within the . . . category of a nonpublicforum . . . ").

As this Court concludes that MIA is not a public forum, it is not necessary to reach the questions of whether § 25-2.2 is narrowly tailored, or whether it leaves open ample alternative channels of communication. *See Perry*, 460 U.S. 37. Rather, as directed by *Lee*, and in the absence of evidence that the ordinance is targeted at a speakers' viewpoint, the inquiry is one of reasonableness.

Plaintiffs contend that even if a reasonableness standard applies to MIA as a nonpublic forum, this case is distinguishable from *Lee*. Plaintiffs argue that, unlike the New York/New Jersey Port Authority's interests, the specific interests raised by Defendants do not support the solicitation restrictions at issue. *Plaintiffs' Motion for Summary Judgment*, p.9.

The reasonableness standard does not require that the restrictions be the most reasonable or that they be the only reasonable limitation. *Lee*, 505 U.S. at 683. In *Lee*, the

Supreme Court found reasonable the Port Authority's interest in monitoring solicitation activity (and the procedures which were undertaken in that regard) to ensure that travelers were not interfered with unduly. *Id.* at 690. Face-to-face solicitation presents risks of duress, fraud and abuse that are appropriate targets of regulation. "In-person solicitation of funds, when combined with immediate receipt of that money, creates a *risk* of fraud and duress that is well recognized, and that is different in kind from other forms of expression or conduct." *Id.* at 705 (Kennedy, J., concurring)[7] (emphasis added). In *Lee*, the ban on solicitation and receipt of funds within the airport terminals was approved without any evidence of fraud on the part of those opposing the ban.

In the present case, Defendants assert that the ordinance was implemented because solicitation "interferes with [MIA's] passengers." *Deposition of Dickie K. Davis,*[8] p.38. Defendants have submitted multiple written complaints received from passengers at MIA regarding the conduct and activities of members of ISKCON Miami during the approximately ten year period prior to the enactment of the ordinance. Beginning in April 1985 and continuing until December 1994, approximately sixty-eight complaints[9] were received regarding solicitation or

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[7] Justice Kennedy notes in his concurrence that he found the Port Authority regulation constitutional even under the more stringent analysis applicable to a public forum.

[8] Ms. Davis is the Manager of the terminal complex at MIA. *Deposition of Dickie K. Davis,* p.3.

[9] Plaintiffs note in their *Response to Defendants' Motion for Summary Judgment* that as many as 79 written complaints were provided in discovery. See *Response,* p.2 n.1.

related activities, including, e.g., fifteen complaints describing attempts "to retrieve literature" from passengers (as characterized by Plaintiffs).[10] *See, e.g., Defendants' Statement of Material Facts,* Ex. A (Complaint of Bruce Dreger, Feb. 13, 1987). Though not dispositive to the Court's analysis of this ordinance's constitutionality, these complaints are significant in light of the applicable reasonableness standard.

Plaintiffs further attempt to distinguish this case by aptly noting that the regulation upheld in *Lee* was not a total ban, as it did not prohibit soliciting on the sidewalks outside of the Port Authority terminals. Similarly, as construed by Defendants[11], the ordinance at issue in the instant case is not a total ban, but merely prohibits the immediate receipt of money outside customary commercial venues.[12] *Defendants' Response to Plaintiffs' Motion for Summary Judgment,* p.2. As the ordinance does not completely forbid solicitation, the Court concludes that § 25-2.2(a) is not an impermissible restriction of speech. Like the restriction in *Lee,* the solicitation regulation here

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[10] As part of the practice of soliciting contributions, Plaintiffs reportedly permit persons to "hold and examine" the literature, *Deposition of Verne Meis,* p.10, and then demand its return if the person does not contribute.

[11] Unless Defendants' interpretation of the ordinance is plainly erroneous or inconsistent with that regulation, such construction will be accorded controlling weight. *United States v. Larionoff,* 431 U.S. 864, 872 (1977).

[12] In the hypothetical posed by the Court at the hearing, a motivated sales clerk would not be permitted to exit his post in one of the duty free shops at MIA and search for a customer to purchase alcohol within the shop.

does not, as Plaintiffs contend, totally prohibit a specific message; rather, it regulates the manner in which the message may be conveyed. *See Id.* 505 U.S. at 707 (Kennedy, J., concurring). Justice Kennedy's concurrence suggests that ISKCON could distribute pre-addressed envelopes in which potential supporters might mail their donations.[13] *Id.*

An analysis of the applicable law requires the conclusion that the provision of § 25-2.2 restricting solicitation at MIA is not an unconstitutional regulation of speech which is otherwise protected by the First Amendment.

b. Regulation of Distribution

Plaintiffs maintain that § 25-2.2(c) vests the Airport Director with too much discretion in selecting areas where literature may be distributed free of charge. Plaintiffs further argue that the First Amendment zones established by the Airport Director are "arbitrary and capricious, in that there has been no finding that literature distribution impairs any of the interests identified in section 25-2.2(d)." *Complaint,* ¶ 26(c).

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[13] ISKCON Miami has indicated that such methods have been unsuccessful in practice. *See Meis Deposition* at 65-66. However, Justice Kennedy's opinion in *Lee* was driven by his analysis of the Port Authority as a public forum, thus mandating an inquiry into alternative channels of communication. *See Lee,* 505 U.S. 672 at 700. In a nonpublic forum, such as MIA, alternative channels of communication are not required.

The allocation of First Amendment space at the MIA is "more appropriately handled by the appropriate MIA officials who draft the regulations. . . . " *ICLC v. Dade Metro.*, 724 F.Supp. at 928. "The validity of such regulations does not turn on a judge's *agreement* with the *responsible decisionmaker* concerning the most appropriate method for promoting significant government interests." *United States v. Albertini*, 472 U.S. 675, 689 (1985) (emphasis added); *see also, Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984) (noting that the Supreme Court's prior time, place, or manner decisions do not suggest that the courts may replace the Park Service as the most appropriate decisionmaker regarding the Nation's parks). In *Denver Area Educational Telecommunications Consortium v. FCC*, ___ U.S. ___, 116 S.Ct. 2374 (1996), the Supreme Court upheld a federal provision which grants cable system operators the discretion to restrict programming that the operator "reasonably believes" depicts indecent programming.[14] According to the Court, the reasonableness requirement "constrain[s] the discretion of the cable operator as much as [it] protect[s] it." *Id.* at 2390.

Plaintiffs have not demonstrated that § 25-2.2(c) impermissibly grants the Airport Director the discretion to regulate First Amendment activities at MIA. The ordinance provides that the restrictions must be "reasonable

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[14] While refusing to apply the public forum doctrine to a common carrier (cable operator), the Court suggested that such a label alone would not make "a critical First Amendment difference" in its analysis of the statute at issue. *Denver v. FCC*, 116 S. Ct. at 2389.

and appropriate, and . . . necessary . . . to assure the safe and orderly use of the Airport facilities by the public." § 25-2.2(d). The Court now examines whether the Director exercised such discretion within the boundaries of the First Amendment.

In a nonpublic forum, "[t]he Government . . . does not enjoy absolute freedom from First Amendment constraints." *United States v. Kokinda*, 497 U.S. 720, 726 (1990). As indicated above, however, "the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Education Assn. v. Perry Educators' Assn.*, 460 U.S. at 46. The *Lee* Court noted that leafletting in a nonpublic forum does not necessarily present the same difficulties posed by face-to-face solicitation. 505 U.S. at 690 (O'Connor, J., concurring). As Justice O'Connor explained, a regulation banning the distribution of all printed or written material would not be reasonable, *id.*; *see also, Multimedia Pub. Co. of South Carolina, Inc. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154 (4th Cir. 1993) (declaring unconstitutional a total ban on newsracks in an airport terminal building); however, restricting the distribution of literature to specific location(s) in the airport terminal would be permissible, *see Lee*, 505 U.S. at 692 (O'Connor, J., concurring).

The Supreme Court has upheld restrictions which limited distribution to fixed locations. *Heffron v. ISKCON*, 452 U.S. 640 (1981) (upholding a regulation that designated fixed locations for the distribution of materials on

state fairgrounds). In this Circuit, restrictions as to distribution at a specific cite have been upheld. *International Caucus of Labor Committees v. City of Montgomery*, 111 F.3d 1548 (11th Cir. 1997) (upholding policy banning distribution of literature from tables on city sidewalks). MIA permits distribution of literature in eight First Amendment zones within the terminal. *Defendants' Statement of Material Facts*, ¶ 16. This Court need not find that the specific time, place and manner restrictions chosen by MIA are the most suitable or best alternative, only that they are reasonable. *See Ward v. Rock Against Racism*, 491 U.S. 781 (1989) ("[A] regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative").

Moreover, MIA does not purport to pass judgment on the content of Plaintiffs' religious expression, as the same limitations imposed by the Director apply to all groups, religious or otherwise, who seek to distribute literature at MIA. Section 25-2.2(c) simply preserves MIA's ability to successfully facilitate the provision of air travel and related services to passengers. Thus, this Court concludes that § 25-2.2(c) is a reasonable time, place and manner restriction. Based on the above, Plaintiffs' First Amendment claim must fail.

II. The Religious Freedom Restoration Act

Plaintiffs have also alleged that § 25-2.2(a) violates the Religious Freedom Restoration Act ("RFRA"). The Supreme Court's recent decision of *City of Bourne v. Flores*, No. 95-2074 (June 25, 1997), which held that the

RFRA unconstitutionally exceeds Congress' power, renders Plaintiffs' claim moot. Prior to the Supreme Court's pronouncement, this Court had determined that Plaintiffs had failed to demonstrate a RFRA violation. The following observations are offered as to this issue.

As enacted, the RFRA permitted a "government"[15] to substantially burden a person's exercise of religion if it demonstrated that application of the burden to the person is in furtherance of a "compelling governmental interest" and was the "least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b); *Wisconsin v. Yoder*, 406 U.S. 205.

To establish a claim under the RFRA, Plaintiffs must make a threshold showing that application of the ordinance results in a substantial interference with the right of free exercise of religion. The RFRA specifically defines the term "exercise of religion" as the exercise of religion under the First Amendment to the Constitution. 42 U.S.C. § 2000bb-2(4).[16] Plaintiffs cannot succeed upon a showing that the ordinance and its implementation merely burden a "way of life" or philosophy of their particular religion. The Act prohibits substantially burdening the "exercise of religion", which has been interpreted as the "religious belief" or exercise of "actual religious convictions". *Werner*, 49 F.3d 1476 (10th Cir. 1995).

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[15] Metropolitan Dade County is a "subdivision of a State", as defined at 42 U.S.C. § 2000bb-2(1).

[16] Upon such showing, the burden shifts to Defendants to demonstrate that the ordinance furthers a compelling state interest in the least restrictive means available. *Werner v. McCotter*, 49 F.3d 1476 (10th Cir. 1995).

Plaintiffs participate in *sankirtan* as a practice of their religious. [sic] *Sankirtan* requires members to "approach people in public places to proselytize, solicit donations, sell and distribute literature, and other items of religious significance, and disseminate information about Krishna conscious programs and activities. *Verne Meis Declaration*, ¶ 4. "[T]he request and receipt of funds – whether by sale or donation – is essential to [ISKCON's] missionary activities." *Id.* ¶ 8. Defendants do not dispute that the practice of *sankirtan* is a demonstration of religious beliefs held by Plaintiffs. The question is whether § 25-2.2 substantially burdens the exercise of those beliefs under the circumstances in question. Courts in the Tenth Circuit have provided some guidance for making this determination:

> [The regulation] must significantly inhibit or constrain conduct or expression that manifests some central tenet of [an individual's] beliefs; must meaningfully curtail [an individual's] ability to express adherence to his or her faith; or must deny [an individual] reasonable opportunities to engage in those activities that are fundamental to [his or her] religion.

Id. at 1480 (citations ornitted); *see also, Thiry v. Carlson*, 78 F.3d 1491 (10th Cir.) (1996).

Government action does not constitute a substantial burden if it merely makes the practice of religion more expensive or more difficult. *Braunfeld v. Brown*, 366 U.S. 599 (1961); *see also, Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995) (holding that interference must be more than an inconvenience and must involve tenet or belief central to religious doctrine). "Th[e] incidental effects of government programs, which may make it more difficult to

practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, [do not] require government to forward a compelling justification for its otherwise lawful actions." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (harvesting timber and construction of road through forest used by tribes for religious purposes was permissible infringement).

Moreover, a regulation that does not prevent the exercise of right of expression does not "substantially burden" a religious practice related to that expression. *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995); *see also, Thiry*, 79 F.3d 1491. In *Thiry*, the court noted that, in response to questioning by the Court, plaintiffs stated that they would still continue their religious practices and beliefs despite the restriction. *Thiry*, 79 F.3d 1491.

MIA's solicitation restrictions do not prevent ISKCON from engaging in *sankirtan*. As noted above, § 25-2.2 legitimately regulates the time, place, and manner of distribution and solicitation activities at MIA. Although *sankirtan* includes the distribution of literature and the solicitation of funds, Plaintiffs have failed to demonstrate that § 25-2.2 "substantially burden[s]" these activities, as defined in the RFRA. While the RFRA is no longer applicable, the Court's observations may be of some academic interest in an area of the law which is in constant development.

CONCLUSION

For the reasons stated, the Court concludes that Defendants have met the burden required for the entry of summary judgment. It is thus

ORDERED AND ADJUDGED that the Defendants' Motion for Summary Judgment be GRANTED, and the Plaintiffs' Motion for Summary Judgment and/or Preliminary Injunction be DENIED. A separate final judgment will issue accordingly.

DONE AND ORDERED in chambers at Miami, Florida this 9th day of July, 1997.

/s/ William M. Hoeveler
WILLIAM M. HOEVELER
SENIOR UNITED STATES
DISTRICT JUDGE

Copies to:

Heyward Bradman, Esq.
Lee Kraftchick, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

ISKCON MIAMI INC., et al.,

Plaintiffs,

vs.

METROPOLITAN DADE COUNTY et al.,

Defendants.

NO; 96-28-CIV-HOEVELER

FINAL JUDGMENT
CLOSED CIVIL CASE

(Filed July 10, 1997)

THIS CAUSE is before the Court on the Motions for Summary Judgment filed by the parties herein. A memorandum order granting Defendants' Motion for Summary judgment and denying Plaintiffs' Motion has been entered this date. Pursuant to the conclusions set forth in that Memorandum Order, it is

ORDERED AND ADJUDGED that judgment be and it is hereby entered in favor of the Defendants, METROPOLITAN DADE COUNTY, FLORIDA, and GARY DELLAPA, Aviation Director of Miami International Airport, and against the Plaintiffs, ISKCON MIAMI, INC., a Florida nonprofit religious corporation, and VERNE MEIS, an individual. The Plaintiffs shall take nothing by their action and it is hereby dismissed. Appropriate costs shall be taxed by separate motion and order.

DONE AND ORDERED in Chambers at Miami, Florida, this 9th day of July, 1997.

/s/ William M. Hoevler
SR. UNITED STATES
DISTRICT JUDGE

cc: Heyward A. Bradman, Esq.
Lee Kraftchuck, Esq.